



STATE OF INDIANA

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March 15, 2012

Seth E. Anderson
126 W. Lamont Road
Huntington, Indiana 46750

Re: Formal Complaint 12-FC-44; Alleged Violation of the Access to Public Records Act by the Huntington County Commissioners

Dear Mr. Anderson:

This advisory opinion is in response to your formal complaint alleging the Huntington County Commissioners (“County”) violated the Access to Public Records Act (“APRA”), Ind. Code § 5-14-3-1 *et seq.* Our office forwarded a copy of your formal complaint to the County. As of today’s date, we have yet to receive a response.

BACKGROUND

In your formal complaint, you allege that on January 26, 2012, you submitted four separate requests to the County for “emails that qualify as public records that were sent to, or from Tom Wall, Leon Hurlburt, Kathy Branham, and Erika Devine between September 1, 2011 and January 15, 2012. All four individuals are considered to be public employees of the County. On February 12, 2012, Robert Garrett, County Attorney, denied your request stating that it did not meet the requirement of reasonable particularity pursuant to I.C. 5-14-3-3. You do not believe that the County should be able to deny your request for lack of particularity. In addition, you do not agree with prior opinions of the Public Access Counselor’s Office, specifically Counselor Neal’s, that have required that a request for e-mail correspondence of a public employee is not reasonably particular unless the requestor is able to provide the sender, recipient, and a date range.

As an initial matter, you take note that Counselor Neal and other counselors since have defined “reasonable particularity” as, “the quality or state of being particular as distinguished from universal.” In a 2009 opinion, Counselor Neal stated that a blanket request for “all e-mail” is universal rather than particular in that such a request is not just for an entire category of records, but all records sent or received using a certain form of communication. You believe that the failure to further analyze the definition of “universal”, which is defined as “including or covering all or a whole collectively or distributively without limit or exception,” has led to the improper conclusion that email

requests that fail to provide the sender, recipient, and date range are not reasonably particular.

In your request submitted to the County, you did not ask for all e-mails, which would be universal. Rather, you requested e-mails to and from a particular individual, which was further limited by a date range. You further requested only those e-mails which would be considered public records. As such, you believe that your request was reasonably particular and all records responsive should be provided. You believe that the current standard for reasonable particularity provided by the County and prior opinions of the Public Access Counselor requires a burdensome level of particularity which dangerously limits the citizens of Indiana from overseeing the business of the state and local government.

Another flawed argument you believe that was provided by Counselor Neal that was used to rationalize denying access to e-mails requests was by comparing e-mail correspondence to postal mail and facsimile transmissions. Counselor Neal advised that just because correspondence is communicated using a different medium does not change the scenario, as few individuals would disagree that a request for any piece of postal mail sent or received by a public agency would not be considered reasonably particular. You provide that the Indiana Code does not prohibit a request for a particular form of communication, only that the request be made with reasonable particularity. You note that e-mails, as compared to postal mail or facsimile transmissions, are not kept in the same manner. Postal mail does not necessarily keep identifying information that records the date of receipt, which is an inherent attribute of all e-mail correspondence.

E-mail records are typically kept in a central location, and are easily sorted by the public employee or official who sent or received the correspondence and the date the e-mail was sent or received. Any public agency that has the technology to receive and retain e-mails also has the technology and the ability to sort said records by date sent or received by the public official whose e-mails are requested. To require additional criteria on naming an additional participant involved as the sender or receiver along with a date range to make the records disclosable requires the same process of retrieval only with a higher level of refinement than those requests that simply provide an individual employee and date range.

You further provide that you are able to meet the requirements of reasonable particularity as defined by Counselor Neal in 09-FC-104, who stated that “generally, I advise public employees and officials that if they can determine from the request what records a person is seeking, the request was likely made with reasonable particularity.” As applied to your request, the County is able to discern what records are sought from the plain language of the request. You have submitted a previous request in 2010 to the County for emails to and from employees in the Clerk’s Office for a two-day time period was granted, despite the request being broader than the current request that was submitted. Further, you have had discussions with local technology employees who have confirmed that emails being requested by a government official based on a date range can

be easily identified. You further note that a request may not be denied simply because the request returned a voluminous amount of records.

ANALYSIS

The public policy of the APRA states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” *See* I.C. § 5-14-3-1. The County is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the County’s public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

The APRA requires that a records request “identify with reasonable particularity the record being requested.” I.C. § 5-14-3-3(a)(1). However, because the public policy of the APRA favors disclosure and the burden of proof for nondisclosure is placed on the public agency, if an agency needs clarification of a request, the agency should contact the requester for more information rather than simply denying the request. *See generally* IC 5-14-3-1; *Opinions of the Public Access Counselor 02-FC-13; 05-FC-87; 11-FC-88*. Here, if the County denied your request for failure to identify with reasonable particularity the records that were sought, it violated the APRA. The County’s proper response to such a request would be to seek further clarification from you rather than simply denying the request.

Regarding your request for e-mail correspondence, I addressed similar issues that you have alleged in a prior advisory opinion. In 11-FC-257, I stated as to a request for e-mail correspondence and the requirement of reasonable particularity:

As to your request in Item 2 for all e-mails sent or received by five (5) School employees from May 1, 2011 through August 5, 2011, prior public access counselors had opined on this issue. APRA requires that a request for inspection or copying identify with reasonable particularity the record being requested. *See* I.C. § 5-14-3-3(a). Counselor Neal provided the following under in a 2009 opinion:

With your request, you seek “all emails sent and received by you in the last 100 days.” The County argues this request does not identify with reasonable particularity the record(s) being requested. The APRA requires that a request for access to records identify with reasonable particularity the record being requested. *See* I.C. § 5-14-3-3(a). “Reasonable particularity” is not defined in the APRA. “When interpreting a statute the words and phrases in a statute are to be given their plain, ordinary, and usual meaning unless a contrary purpose is clearly shown by the

statute itself.” *Journal Gazette v. Board of Trustees of Purdue University*, 698 N.E.2d 826, 828 (Ind. Ct. App. 1998). Statutory provisions cannot be read standing alone; instead, they must be construed in light of the entire act of which they are a part. *Deaton v. City of Greenwood*, 582 N.E.2d 882 (Ind. Ct. App. 1991). “Particularity” as used in the APRA is defined as “the quality or state of being particular as distinguished from universal.” *Merriam-Webster Online*, www.m-w.com, accessed July 18, 2007.

In my opinion, your request is universal rather than particular. You have requested not just an entire category of records, but all records sent or received using a certain form of communication. It is important to remember that electronic mail is a method of communication and not a type of record. Electronic mail is one way an agency might receive correspondence. As Mr. Murrell indicates, and as I often advise people, electronic mail messages are similar to postal mail or facsimile transmissions. And certainly few individuals would disagree that a request for any piece of mail sent or received by an agency or official within the last one hundred days would be considered an overly broad request which does not identify with reasonable particularity the record being requested. The same is true for electronic mail messages. That the correspondence is communicated using a different medium does not change the scenario; in my opinion a request which identifies the records only by the particular method of communication utilized is exactly the type of request that I.C. § 5-14-3-3(a) prohibits.

I have previously issued an advisory opinion in a similar matter regarding a request for access to electronic mail messages. In *Informal Opinion 08-INF-23*, I wrote the following:

If, on the other hand, the request identified the records with particularity enough that the School could determine which records are sought (e.g. all emails from a person to another for a particular date or date range), the School would be obligated to retrieve those records and provide access to them, subject to any exceptions to disclosure. *Informal Opinion 08-INF-23*, available at www.in.gov/pac.

Similarly, it is my opinion here that your request is overly broad. If your request identified particular records in such a

way that the agency could identify which records you seek, the agency could better address your request. For instance, you might narrow your request to messages between a county official and certain other individual(s) for certain dates. In some cases, an agency may also be able to sort messages on the basis of the subject of the email. But this type of search is only as good as the information which appears in the "Subject" line of each electronic mail and is only feasible where an agency has the technology to conduct a search other than a manual search. *Opinions of the Public Access Counselor 09-FC-124 and 11-FC-12.*

I agree with Counselor Neal's and Kossack's analysis in regards to this issue. As such, it is my opinion that your request was not reasonably particular and did not meet the requirements of I.C. § 5-14-3-3(a). If you would narrow your request by providing the sender, recipient, and a particular range of dates, the School should comply with the request unless an exception to the APRA permits or requires withholding all or part of any records responsive to your request. Therefore, it is my opinion that the School did not violate the APRA in responding to Item 2 of your request. *See Opinion of the Public Access Counselor 11-FC-257.*

The guidance provided by the Public Access Counselor's on e-mail correspondence and APRA's requirement of reasonable particularity dates back to 2008. The following informal and formal opinions have addressed this issue: 08-INF-23, 09-FC-24, 09-FC-104, 09-FC-124, 10-FC-57, 10-FC-71, 10-FC-272, 10-FC-311, 11-FC-12, and 11-FC-80. The formal and informal opinions provide that e-mail is a method of communication and not a type of record; requests for records that only identify the records by method of communication only are not reasonably particular. I am not aware of any case law from the Indiana Supreme Court or Appellate Court that has held the guidance provided by the Public Access Counselor was contrary to the APRA. Further, the Indiana General Assembly has not responded to the guidance provided the Public Access Counselor on this issue by amending the APRA.

I would note that a request for all e-mail correspondence to and from Jane Doe for a range of dates is not reasonably particular. *See Opinion of the Public Access Counselor 09-FC-124, 11-FC-12, and 11-FC-257.* However, a request for all e-mail correspondence from Jane Doe to Jim Smith for a range of dates would be reasonably particular. *See Opinion of the Public Access Counselor 09-FC-24.* I do not believe that by limiting your request for only e-mail correspondence that is considered to be a "public record" further distinguishes the request from prior advisory opinions issued as all e-mail correspondence sent or received via a public agencies' email system is considered to be a public record pursuant to the APRA. You are correct in providing that a records request submitted via the APRA may not be denied due to the extensive nature of the request. However you have not alleged that the County denied your request due to the potential voluminous response that it would generate.

CONCLUSION

For the foregoing reasons, it is my opinion that if the County denied your request for failure to identify the records that were sought with reasonable particularity, then it acted contrary to the requirements of the APRA. As to all other issues, it is my opinion that the County has not violated the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is stylized with a large initial "J" and a cursive "Hoage".

Joseph B. Hoage
Public Access Counselor

cc: Huntington County Commissioners